STATE OF MICHIGAN

COURT OF APPEALS

AFCON, INC.,

Plaintiff/Counter-Defendant,

v

ELLIS-DON MICHIGAN, INC.,

Defendant/Counter-Plaintiff/Garnishee-Plaintiff-Appellant,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Garnishee-Defendant-Appellee.

UNPUBLISHED
February 22, 2005

No. 250100
Wayne Circuit Court
LC No. 02-203629-NZ

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Garnishee-plaintiff Ellis-Don Michigan, Inc. (Ellis-Don) appeals by leave granted the order denying its motion for summary disposition under MCR 2.116(C)(10) against garnishee-defendant Liberty Mutual Insurance Company (Liberty Mutual) and dismissing Ellis-Don's writ of garnishment. This case arises out of a dispute regarding the applicability of insurance coverage to certain alleged damages sustained to a construction project, on which Ellis-Don and plaintiff AFCON, Inc. (AFCON) worked.

I. Material Facts And Proceedings

The underlying factual history is undisputed. Ellis-Don was the general contractor for the construction of a sewer overflow detention basin and treatment facility that was to be constructed on the bank of the Rouge River. To safely perform the required excavation, retaining walls had to be constructed to protect the workers and project from the collapse of the surrounding earth. Ellis-Don hired AFCON to build the walls.

On May 8, 1995, after excavation under one section of the wall, designated as "Wall A-B," reached a depth of sixteen feet, Wall A-B moved. A week later, Ellis-Don excavated another five feet but was forced to stop working when the wall moved again, causing a deep, two

hundred foot long crack in the soil held back by the wall. Ellis-Don consulted an engineering firm, which recommended that Ellis-Don build two dirt berms perpendicular to the wall to prop it up. In order to gain access to its work area, Ellis-Don had to constantly move the berms until the facility structure was strong enough to allow removal of the retaining wall. The consulting fees, extra labor and materials totaled $144,642.40, not including the initial cost of building the support berms. Detroit city engineers also installed monitoring devices, the cost of which ($38,459.20) the city deducted from Ellis-Don's contract.

In light of the extra expense incurred by Ellis-Don, it did not pay AFCON for a portion of its work. As a result, AFCON brought suit against Ellis-Don, alleging that Ellis-Don still owed AFCON $174,139. Ellis-Don responded by filing a counter-complaint, seeking $417,000 in damages, including damages resulting from the movement of Wall A-B.

AFCON tendered defense of Ellis-Don's counter-complaint to its insurer, Liberty Mutual. Although initially providing AFCON with defense counsel under a reservation of rights, on May 28, 2002, Liberty Mutual sent a denial letter to AFCON. The letter indicated that certain policy exclusions barred coverage, including: (1) business risk, (2) work in progress, and (3) loss of use. Liberty Mutual explained that the policy only covered physical damage to third-party property caused by AFCON's work or products. According to Liberty Mutual, the policy did not cover damage to AFCON's own work or products, or property that incorporated AFCON's work or products. Liberty Mutual contended that Ellis-Don's pleadings alleged no such damage.

In early October 2002, AFCON and Ellis-Don settled all their claims, except Ellis-Don's claim stemming from the wall movement. AFCON notified Liberty Mutual of the settlement and tendered defense of the remaining counter-claim. Liberty Mutual responded by requesting further information but still reserving its rights and refusing to provide counsel. AFCON forwarded the letter to Ellis-Don, requesting that it respond to Liberty Mutual. After receiving no response from its correspondence, Ellis-Don moved for a default judgment. On December 6, 2002, the court entered a default against AFCON in Ellis-Don's favor in the amount of $236,578.75. Following entry of the default judgment, Ellis-Don filed a writ of garnishment on Liberty Mutual pursuant to the insurance policy between Liberty Mutual and AFCON. Liberty Mutual continued to deny any indebtedness to AFCON.

Ellis-Don then moved for summary disposition under MCR 2.116(C)(10), arguing that the "business risk" exclusions did not apply because the claimed damages were to Ellis-Don's work area, not to AFCON's wall. Further, Ellis-Don argued that the "work in progress" exclusions did not apply because AFCON's work on the wall was complete. Finally, Ellis-Don asserted that the "loss of use" exclusions did not apply because the wall movement was not expected or intended by AFCON. After hearing oral arguments and reviewing supplemental briefs submitted by the parties, the court denied the motion and dismissed Ellis-Don's writ of garnishment.

II. Analysis

Ellis-Don argues on appeal, as it did in the trial court, that none of the insurance policy exclusions cited by Liberty Mutual are applicable to bar coverage. We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus, "the court looks to the contract as a whole and gives meaning to all its terms." *Harrington*, *supra* at 381. Absent an ambiguity, a contract must be construed to adhere to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Exclusionary clauses are strictly construed in the insured's favor. *South Macomb Disposal Auth v American Ins Co*, 225 Mich App 635, 653; 572 NW2d 686 (1997). Because an insurance company may not be held liable for unassumed risks, clear and specific exclusions must be given effect. *Id*. If any exclusion in an insurance policy applies to a claimant's particular claims, coverage is lost. *Id*. at 654.

Under the policy terms, Liberty Mutual agrees that it "[w]ill pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." "Property damage" is defined by the policy as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

A. "Business Risk" Exclusions

The first set of exclusions at issue, together referred to as the "business risk" exclusions, state as follows:

> k. Damage to Your Product
>
> "Property damage" to "your work" arising out of it or any part of it.
>
> l. Damage to Your Work
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The core of the present dispute is whether Ellis-Don's "damages" constituted "property damage" or whether its "damages" were merely additional costs expended to remedy AFCON's defective wall. They are the latter. As illustration for this conclusion, we point out that, in the proceedings below, the court asked counsel for Ellis-Don, "What property of yours did they damage?" To which Ellis-Don's counsel responded, "They damaged our work site. We had to

move this berm that was propping up their wall because we had a big pile of dirt in our work area." It is clear from Ellis-Don's allegations and arguments that the "damage" that they incurred was additional costs associated with rectifying AFCON's allegedly faulty work product.

Ellis-Don attempts to save its case by arguing that the crack in the soil constitutes "property damage." "Property damage" – physical injury to tangible property – in other cases has consisted of, for example, removal and replacement of the concrete floor in which a defective radiant heating tube was placed, *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962); damage to the interior of a building from a leaky roof, *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435 (ED Mich, 1992); damage to a mobile home as a result of structural defects, *Radenbaugh v Farm Bureau Gen Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000); and fire damage to a tunnel under construction and construction equipment, *Dimambro-Northend Assoc v United Constr, Inc*, 154 Mich App 306; 397 NW2d 547 (1986). Considering these examples, we decline to conclude that the crack in the soil constituted physical injury to tangible property. The earth is tangible property to the extent that it "has physical form and characteristics," Black's Law Dictionary (7th ed), p 1234, and is "capable of being touched," *Random House Webster's College Dictionary*, p 1315 (1997). However, the crack in the soil does not reasonably constitute injury or damage. The crack was merely a natural occurrence that happened as a result of the wall movement. There is no indication that the value or usefulness of the soil was reduced. See "damage," *id*. at p 333.

Therefore, the "business risk" exclusions bar coverage under the policy because Ellis-Don's "damages" were not "property damage," but additional costs associated with rectifying AFCON's faulty work product.

B. "Work in Progress" Exclusions

Although our conclusion, that the business risk exclusions bar coverage, requires affirmance of the trial court's decision, we address the other two categories of exclusions that have been raised and addressed by the parties. The second set of exclusions, together referred to as the "work in progress" exclusions, state as follows:

> j. Damage to Property
>
> * * *
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Accepting that, in constructing the berms, etc., Ellis-Don was performing remedial work on AFCON's wall, Ellis-Don, a contractor, was still performing operations on the wall when the damages occurred. Moreover, in its counter-complaint, Ellis-Don specifically claimed that the wall was not constructed in a workmanlike manner, and under § 2.j.(6) of the policy, AFCON's

incorrectly performed work is expressly excluded from coverage – AFCON's work was allegedly performed in a faulty or defective manner, and Ellis-Don had to repair it.

Therefore, we conclude that "work in progress" exclusions also bar coverage under the policy because Ellis-Don's claimed "damages" were its additional costs associated with rectifying AFCON's faulty work product.

C. "Loss of Use" Exclusions

The third set of exclusions, together referred to as the "loss of use" exclusions, state as follows:

> m. Damage to Impaired Property or Property Not Physically Injured
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Ellis-Don does not appear to dispute the applicability of the exclusion, but rather argues, under the exemption to the exclusion, that the wall movement was unexpected, unintended, and unanticipated; therefore, the wall defect was unintentional and qualifies as "sudden and accidental." In its counter-complaint, Ellis-Don alleged that "AFCON failed to construct the auger cast piling wall in a workman-like manner and to specification." This allegation defeats any argument that the accident was sudden and accidental, for the construction was done purposefully and according to a plan of action. Therefore, we conclude that the "loss of use" exclusions bar coverage under the policy because Ellis-Don's "damages" were its additional costs associated with rectifying AFCON's allegedly faulty work product, not the result of some sudden and accidental injury.

Because of our conclusion, Ellis-Don's claim for attorney fees and costs is moot.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens